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# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 265

MEDO PHOTO SUPPLY CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The majority and concurring opinions of the court below (R. 304–307, 308–310) are reported in 135 F. (2d) 279. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 275–295) are reported in 43 N. L. R. B. 989.

### JURISDICTION

The petition for a writ of certiorari was granted on October 11, 1943 (R. 318). The jurisdiction of this Court rests upon Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether it is an unfair labor practice under Section 8 (1) and (5) of the Act for an employer, who has recognized and begun to bargain collectively with the representative designated by a majority of the employees in an appropriate unit, to negotiate, directly and in disregard of that representative, with a group of employees within the unit, respecting individual wage increases.

2. Whether it is an unfair labor practice under Section 8 (1) of the Act for an employer at the suggestion of his employees to grant them wage increases in return for their abandonment of a labor organization.

3. Whether it is an unfair labor practice under Section 8 (1) and (5) of the Act for an employer to refuse to bargain collectively with a labor organization which has lost its majority status because of defections caused by the employer's unfair labor practices.

4. Whether the Board, having found that an employer had interfered with the self-organization of its employees and had refused to bargain collectively with a labor organization designated by the majority of the employees in an appropriate unit, could validly order the employer to bargain with the labor organization where by the

time of the Board's hearing some of the union members had entered the armed forces of the United States and the evidence failed to disclose whether the employees who had designated the union still constituted a majority of the employees in the unit.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infr*, pp. 44–48.

## STATEMENT

Upon the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 275–295). The facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

Petitioner, a New York corporation, is engaged in New York City in the purchase, sale, and distribution of photographic supplies and related equipment such as cameras, film, and papers (R. 278; 226–227).[2] Between May 21 and 23, 1941, 18 of the 26 employees in petitioner's shipping and receiving department, an appropriate bargaining unit (R. 278–280),[3] signed cards designating

[1] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[2] No jurisdictional question is involved.

[3] The appropriateness of this unit is not in question here.

Photo Employees Union, Local 21314, affiliated with the American Federation of Labor, hereinafter called the Union, as their collective bargaining agency (R. 280–281 and note 3 thereat; 228–229, 152–153, 10–14, 44–45).[4] On May 22 and 23, the Union requested petitioner to meet with it to negotiate a collective bargaining contract (R. 28; 15–16, 230), and on the latter day the Union filed with the Board a petition for certification as the exclusive bargaining representative of the shipping and receiving department employees (R. 281; 16–17, 233–234).

On June 4, 1941, a conference with respect to the Union's petition for certification was held in the regional office of the Board, attended by representatives of the Board, the petitioner and the Union (R. 281–282; 20–22). At this meeting, petitioner's attorney questioned the appropriateness of the bargaining unit, but declared that if the parties could agree as to the unit petitioner would consent to the Union's being certified and thereupon the parties "would automatically go into the process of bargaining" (R. 282; 20–22).

At a second conference, held on June 5, petitioner did not advert to its previously asserted doubt as to the unit, but its attorney requested a copy of the Union's proposed contract, explaining in substance that petitioner intended to "fight"

[4] The Union was at the time engaged in a drive to organize photo supply employees throughout New York City (R. 6–7).

the Union's right to certification only if the proposed contract were "too tough" and that it "certainly was not going to buy a pig in a poke * * *, by consenting to the Union being certified and then finding out what they had to bargain for" (R. 282–284; 22–24). The Union thereupon submitted its proposed agreement (R. 283–284; 25).[5] Petitioner's attorney, after examining it and consulting privately with petitioner's officials, stated that he believed the document afforded "a basis for negotiations, and we can arrive at an agreement" (R. 283–284; 25).

Petitioner's attorney then asked how many employees had signed union cards and requested the Union to present its cards as proof of its claim (R. 283; 53–54). The Union offered to submit its cards to an impartial third person for a check, but petitioner's attorney replied that he had no doubt as to the Union's majority status (R. 283; 54).[6]

The Union's representatives then sought to arrange for the promised certification, but petitioner's attorney declared that there was "no sense in going through all that. After all, you have got

[5] The wage rates proposed in the contract had been formulated at a meeting held in the union offices attended by all of the 18 employees of petitioner who had joined the Union (R. 90–91, 111–112).

[6] The Union representative did turn the cards over to a Board representative and agreed that the latter might check them against the petitioner's pay-roll signatures (R. 65, 20).

all you wanted, and we are going to negotiate with you." When the Union's agent insisted that "our people would feel very much better off" with an "official" certification, petitioner's attorney declared, among other things, that the Union was "making a mountain out of a molehill. * * * let us sit down and negotiate. That is the primary thing you are after" (R. 214; 25–26). It was then agreed to meet again on Monday, June 9, to negotiate respecting the contract proposed by the Union (R. 284–285; 26). Thus, at this second meeting petitioner waived its objections, if any, to the unit, conceded that the Union represented the necessary majority, recognized the Union, and agreed to meet with it again the following Monday to commence collective bargaining (R. 284–285).

Meanwhile, on Saturday, June 7, it was decided by some of the members of the Union that they would solicit from petitioner a wage increase upon the basis that they would abandon the Union if the increase were granted, but that they would continue as members of the Union if the request were denied (R. 285; 109, 122–123). Accordingly, that afternoon a group of 12 employees visited petitioner's Manager Hoppin; stated that they and six other employees who were unable to be present had decided among themselves that they would leave the Union if the petitioner would give them wage increases; and submitted a list of the wage

increases which they proposed (R. 285, 288; 231–232, 83–87, 106, 185–186, 239–241).[2] Hoppin advised the group that he would discuss their proposal with petitioner's president and suggested that they return on Monday, June 9, when he would give them petitioner's answer (R. 285; 101, 116, 178). The action of the employees in approaching petitioner at this time did not constitute a withdrawal of their designations of the Union; on the contrary, in doing so the employees clearly held themselves out as union members but were offering petitioner, for a price, namely wage increases, the power to veto their choice of a representative; and the Union accordingly continued to be the statutory exclusive representative for purposes of collective bargaining (R. 288).

On Monday morning, a committee of four of the employees called on Hoppin, who then informed them that petitioner was granting the increases substantially as requested (R. 285–286;

[2] The list they submitted contained the names of 16 union members and listed opposite each name the new rate of pay sought (R. 240–241, 228–229). The four employees who had been chosen as the union negotiating committee were introduced to Hoppin as the representatives who were to have spoken for the Union and during the ensuing discussion served as spokesmen for the group (R. 75, 112, 120, 240–241). The only authority which these employees had to speak for the six employees who were absent and whom they claimed to represent was based on the theory that these six employees as union members had at the union meeting participated in electing the four to the union negotiating committee (R. 75–77, 119–120).

101–102, 189, 241–242).[8] Petitioner's decision to take this action was occasioned solely by the employees' offer to withdraw from the Union if the raises were granted (R. 286).[9] The committee reported back to the other employees who agreed

[8] The following table shows the names of the 16 employees to whom Hoppin agreed to give increases, together with the designation of their job (R. 236), the amount of their wage rate prior to the increase (R. 236), the amount of the increase granted by Hoppin on June 9 (R. 241–242), and the amount of the increase sought by the Union in the contract it submitted (R. 88–89). All of the 16 were union members (R. 228–229).

| Name | Job | Weekly wage prior to June 9 | Weekly wage after increase | Weekly wage sought by union |
|---|---|---|---|---|
| Pergola | Porter | $12.00 | $15.00 | $17.00 |
| Petrone | Porter | 12.60 | 15.00 | 17.00 |
| Koch | Porter | 12.60 | 18.00 | 21.00 |
| Sussman | Porter | 12.60 | 15.00 | 17.00 |
| Ritchey | Porter | 12.60 | 15.00 | 17.00 |
| Schroeder | Order clerk | 12.60 | 15.00 | 17.00 |
| Goshgarian | Order clerk | 19.00 | 21.00 | 25.00 |
| Schroer | Order clerk | 12.60 | 18.00 | 21.00 |
| Matthews | Order clerk | 13.60 | 18.00 | 21.00 |
| Abelow | Order clerk | 15.00 | 18.00 | 21.00 |
| Valentine | Order clerk | 15.00 | 18.00 | 21.00 |
| Caracci | Order clerk | 15.00 | 18.00 | 21.00 |
| Olivieri | Order clerk | 15.00 | 18.00 | 21.00 |
| Munrett | Shipping clerk | 15.00 | 21.00 | 25.00 |
| Seminari | Shipping clerk | 17.00 | 21.00 | 25.00 |
| Bruchbacher | Shipping clerk | 16.00 | 21.00 | 25.00 |

[9] Hoppin testified that petitioner had decided prior to June 7 to grant wage increases in view of unusually good business (R. 192, 194–196), but the record showed that it was petitioner's normal practice to grant wage increases only at the end of each year (R. 191); and the Board did not credit his testimony that the increase had been contemplated before June 7 (R. 286).

to accept the increases granted (R. 286; 99, 104–105). The committee returned to advise Hoppin that the employees "felt that they did not need the Union and we would rather stay out" (R. 286; 98–99, 101–102).[10] The Union, however, was not told of this decision of the employees at this time.

Later the same day, the four employees comprising the Union's negotiating committee informed the union president for the first time while they were en route to the scheduled bargaining conference, that the employees no longer wished the Union to represent them (R. 287; 30–31, 124–125).[11] At the conference, petitioner's attorney stated that petitioner could not bargain with the Union because he understood that the organization no longer represented a majority, but that if the Union could prove otherwise by a consent election, he would see what could be done (R. 287; 31–32, 161, 175). In answer to the attorney's question, the four employees present again stated that the employees no longer wished

[10] As the employees were leaving Hoppin's office they inquired whether they would, "one or two at a time," be fired because of their conduct in joining the Union. Hoppin assured them that, "Once you leave this office, the whole matter will be forgotten" (R. 139, 232).

[11] The only reason given the union president for their change of mind, was the statement of several employees, "What can you do? You can't fight the firm. They are too big" (R. 31, 59).

the Union to represent them,"[12] and the meeting ended (R. 287; 174–175).

Upon the foregoing facts the Board concluded that petitioner had violated Section 8 (1) and (5) of the Act. It held that petitioner's action on June 7 and 9 in dealing directly with the employees in the unit as to wages while the Union continued to be their designated exclusive agent for bargaining as to such matter and while collective bargaining negotiations were pending with the Union, violated Section 8 (1) and (5) of the Act because such conduct denied the Union its statutory status as the *exclusive* collective bargaining representative (R. 289–290, 293). The Board in explanation of this determination stated (R. 288–289), "To permit the employer to go behind the chosen bargaining agent and negotiate with the employees individually, or with their committees, in spite of the fact that they had not revoked the agent's authority, would result in nothing but disarrangement of the mechanism for negotiation created by the Act, disparagement of the services of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed pur-

[12] None of the employees at any time resigned from the union. And only the four employees on the negotiating committee did so much as orally to tell the Union representative they no longer desired to be represented (R. 287; 94–95, 107, 118, 122, 138, 150).

pose of the Act to avoid—or mitigate."[13] The Board pointed out that it was therefore "immaterial that the direct dealing emanated from the employees rather than from [petitioner]" (R. 289–290).

The Board also held that petitioner's grant of wage increases to the employees in acceptance of their proposal to withdraw from the Union if such increases were granted, constituted "interference with the self-organizational rights of its employees," in violation of Section 8 (1) of the Act (R. 291, 293) because petitioner was under a duty in the circumstances of the instant case "to refrain from action which would influence the employees to abandon the Union * * *" (R. 288–289).

Finally, the Board concluded that petitioner's refusal to negotiate with the Union on June 9 likewise constituted a refusal to bargain collectively, in violation of Section 8 (1) and (5) of the Act (R. 290, 293). The Board rejected petitioner's attempt to "excuse its refusal to bargain on and after June 9 on the basis of the alleged defections" because "even assuming that a number [of employees] sufficient to destroy the [Union's] majority had repudiated the Union be-

[13] In making the latter finding, the Board quoted from the opinion of the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Acme Air Appliance Co., Inc.*, 117 F. (2d) 417, 420.

fore June 9," the defections were induced by petitioner's earlier unlawful conduct in dealing directly with the employees and granting the wage increase (R. 290). The Board stated that "the unfair labor practices of the [petitioner] cannot operate to destroy the exclusive representative status of the Union previously established by the untrammelled will of the majority of employees in the unit" (R. 290).[14]

At the hearing before the Board petitioner claimed that in the course of a normal turn-over of personnel in the unit subsequent to the unfair labor practices, several union members had left its employment and there was no showing that at the time of the hearing the Union continued to retain its majority status in the unit.[15] The Board de-

[14] In support of this proposition the Board cited the decision of this Court in *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318. The Board also found (R. 287) that only 4 of the 18 employees who had joined the Union had informed that organization that they no longer desired it to represent them. Accordingly, it would appear that even on June 9 the Union's numerical majority in the unit of 26 employees had not been effectively destroyed, but, as is stated in the text, the Board based its conclusion as to the impropriety of petitioner's refusal to bargain with the Union on June 9 upon the broader ground that even if there had been resignations they were ineffective because of employer influence.

[15] Petitioner failed to prove how many employees were in the unit at the time of the hearing. It did offer to prove that eight employees were no longer working for it. One of the eight, Scott, was neither in the unit nor even a union member

termined that, even if the claimed loss of majority had occurred, it was nevertheless necessary to order petitioner to bargain collectively with the Union in order to remove the effects of petitioner's unlawful conduct. The Board further stated that it was to be assumed that, absent petitioner's unfair labor practices, the Union would have been able to maintain its majority status despite such turn-over, by enlistments from among the new workers, and that, in any event, in order to effectuate the policies of the Act, it was necessary to restore, as nearly as possible, the *status quo* existing before the unfair labor practices were committed (R. 292).

Accordingly, the Board ordered petitioner to cease and desist from its unfair labor practices, to bargain collectively upon request with the Union, and to post notices of compliance with the order (R. 293–295).

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(R. 193–194, 152–153, 228–229). Another of the eight, Steinberg, was not a union member (R. 194, 228–229). Five of the remaining six were in the armed forces of the United States (R. 194) and therefore still within the unit under the Board's rule permitting employees in the armed forces to vote in elections. *Matter of Cudahy Packing Co.*, 29 N. L. R. B. 830, 835, 836; *Matter of Marcalus Mfg. Co., Inc.*, 33 N. L. R. B. 107, 111 n., 112; *Matter of Rudolph Wurlitzer Co.*, 41 N. L. R. B. 1074, 1076, 1077. Thus, petitioner's offer, even if accepted as true, would not have established that the Union had lost its majority status by a turn-over of employees.

On November 17, 1942, the Board filed its petition for enforcement in the court below and on April 28, 1943, the court handed down its opinion enforcing the Board's order (R. 304–307). Judge Learned Hand concurred in a separate opinion (R. 308–310). A decree enforcing the Board's order was entered on May 21, 1943 (R. 311–312). On August 16, 1943, petitioner filed a petition for a writ of certiorari, and on October 11, 1943, the petition was granted (R. 318).

## SUMMARY OF ARGUMENT

### I

The Board properly determined that petitioner, by negotiating with individual employees respecting wages in disregard of the Union which it had theretofore recognized as the statutory representative of its employees, engaged in an unfair labor practice within the meaning of Section 8 (1) and (5) of the Act. Where, as here, the employees have not revoked their designations of the Union and negotiations with it are pending, the employer is under a duty to carry on all negotiations respecting wages with the statutory representative and not to negotiate directly with the employees in the unit. Both the language of the Act, its rationale, and its legislative history show Congress intended to prohibit an employer from dealing with individual employees or groups of

employees after a statutory representative has been established. The decisions of the courts interpreting the Act uniformly support this view.

## II

The Board properly determined that petitioner, by granting its employees a wage increase upon condition that they revoke their designation of the Union as their representative for purposes of collective bargaining, interfered with, restrained and coerced its employees in the exercise of their rights to self-organization and thereby engaged in an unfair labor practice within the meaning of Section 8 (1) of the Act. The grant of a wage increase in return for abandonment of a labor organization is economic coercion of employees in the exercise of their rights to self-organization. Such coercion is forbidden by the Act.

## III

The Board properly determined that petitioner, by refusing to bargain with the Union after it had granted its employees the increase in wages in return for their abandonment of the Union, violated Section 8 (5) of the Act. Any defections from membership in the Union which were induced by petitioner's use of its economic power in violation of the Act, were properly to be disregarded in determining whether the Union still retained its majority designation at the time

petitioner refused to deal with it and did not excuse petitioner's refusal to bargain. *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340.

## IV

The Board properly ordered petitioner to bargain collectively with the Union as a remedy for its refusal to bargain. The evidence offered by petitioner to show that certain of its employees had entered the armed forces did not establish that the employees who had designated the Union had ceased to constitute a majority of the employees in the appropriate unit. However, even if the change in personnel in the unit had been sufficient to eliminate from petitioner's employ a majority of the persons who had designated the Union, the order to bargain collectively was still appropriate to remedy the unfair labor practice. The Board found that any absence of a present majority designation of the Union is to be attributed to the unfair labor practices. It pointed out that it is proper to assume that absent the unfair labor practices of the petitioner, the Union would have been able to obtain as members at least some of the new employees and would have maintained its majority status despite the turnover of personnel. Where the lack of a majority is thus traceable to an employer's unfair labor practices, the Board may properly require the employer to bargain collectively with the last

freely chosen representative. *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513.

## ARGUMENT

### I

### THE BOARD PROPERLY DETERMINED THAT PETITIONER, BY NEGOTIATING WITH INDIVIDUAL EMPLOYEES RESPECTING WAGES IN DISREGARD OF THE UNION WHICH IT HAD THERETOFORE RECOGNIZED AS THE STATUTORY REPRESENTATIVE OF ITS EMPLOYEES, VIOLATED SECTION 8 (1) AND (5) OF THE ACT

The Board held that petitioner's conduct on June 7 in negotiating directly with twelve employees as to wage increases, after a majority of the employees had selected and petitioner had recognized the Union as the exclusive representative for such bargaining, and while negotiations between petitioner and the Union were pending, itself constituted a violation of Section 8 (1) and (5) of the Act (R. 289, 290).

Petitioner does not controvert the legal principle that it is an unfair labor practice for an employer to bargain individually with employees in the unit at a time when they are represented by a labor organization chosen by a majority of the employees in the unit. Petitioner proceeds throughout its brief on the assumption that subsequent to the time it recognized the Union and before it met with the twelve employees, all of the employees had revoked their designation of the

Union (Br. 2, 5, 7, 10, 13). The Board found, however, that "the employees had not withdrawn their designation of the Union as their representative prior to June 9" (R. 287). In its findings respecting the June 7 conference between petitioner and the twelve employees, the Board pointed out that not only was there no evidence that the Union had ceased to represent the employees, but that no revocation of designation could be implied from their conduct in approaching petitioner because in doing so they held themselves out as union members (R. 288). The Board stated: "Far from communicating to the [petitioner] an abandonment of the Union, the employees there clearly conditioned such abandonment upon the granting of wage increases. Thus they held themselves out as union members, at the same time offering the [petitioner], for a price, the power to veto their choice of a representative" (R. 288). These findings are supported by the testimony of the employees that before approaching petitioner they decided to continue as members of the Union unless they obtained an increase and so informed petitioner (R. 231–232, 93–94, 105–108, 123).

Petitioner's brief proceeds upon the further erroneous assumption that its negotiations with the twelve employees constituted collective bargaining with the majority of the bargaining unit, and thereby superseded the necessity of bargaining with the previously chosen representative (Br. 2,

12, 17). But the evidence shows both that the twelve employees were not the majority of the unit, and that they did not purport to be acting on behalf of the unit.[16] Only twelve out of twenty-six employees in the unit called on petitioner (pp. 3, 6, *supra*). Four of the twelve acted as spokesmen for the group (R. 75, 112, 120, 239–241). Neither the four nor the twelve claimed any authority to speak for nor did they purport to negotiate on behalf of all the employees in the unit. Thus they sought wage increases only for sixteen union members (R. 240–241, 228–229). Though the twelve employees informed petitioner that they "spoke for" six union members who were unable to be present at the conference (R. 240), the assertion of such authority rested solely on the assumption that since the four employees who acted as spokesmen had been elected by all the union members at a union meeting as a union committee, they were empowered to speak for them (R. 119–120, 75–77). But authorization to speak as officer of the union does not, without more, include the power to supersede the union and act in its place. Petitioner thus negotiated with a minority of the employees in the unit who did not even purport to represent the unit as a whole. Even in the absence of a duly designated exclusive representa-

[16] It is thus unnecessary to decide in this case whether an employer can lawfully bargain with a majority of a unit instead of with a previously chosen representative whose authority has not been withdrawn.

tive, such negotiation, while not unlawful if limited to terms for the individuals composing the minority, would nevertheless not constitute the collective bargaining contemplated by the Act. The Board thus properly found that (R. 288–290, 292) petitioner's "act in dealing with its individual employees" did not constitute collective bargaining but was rather a violation of its obligation to bargain collectively. "Clearly to bargain directly with one's employees is not to bargain with their designated exclusive representative" (R. 288).[17]

Petitioner's repeated statement (Br. 2) that it made a "labor agreement" with its employees, uses "labor agreement" in other than its usual sense. The only agreement was the oral arrangement by which petitioner granted the wage increase to the 16 union members and was informed that they were therefore abandoning the Union (R. 98–99, 101–102, 150, 189, 228–229, 242). There was no signed agreement of any kind; no stable employment relations between the employer on the one hand and its employees on the other, dealing as equals, were envisaged. Equality of bargaining power between

[17] Cf. Sen. Rep. No. 573, 74th Cong., 1st Sess., where it is stated (p. 14): "Another protection for minorities is that the right of a majority group through its representatives to bargain for all is confined * * * to cases where the majority is actually organized 'for the purposes of collective bargaining * * *'. An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill."

employees and management was not restored. It does not even appear, as Judge Hand noted (R. 309–310), that the group of employees who dealt directly meant to continue to act as a bargaining authority. On the contrary, the sole objective of the arrangement was to secure wage increases by unilateral dispensation from the employer for an unspecified time, in return for which the employees would abandon the only collective bargaining authority in the unit. In sum, what was contemplated here was the very opposite of collective bargaining such as Congress contemplated to stabilize employment relations and thereby promote industrial peace.

The law is well settled that an employer in ignoring a labor organization which has been designated by a majority of his employees and dealing instead with individual employees respecting a usual subject of collective bargaining such as wages, violates Section 8 (5) of the Act. As this Court has said, the obligation imposed on an employer to treat with the designated statutory representative, being exclusive, "imposed the negative duty to treat with no other." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44. See also *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 548; *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. (2d) 875, 881, 883 (C. C. A. 6); *National Labor Re-*

*lations Board* v. *Martin Bros. Box Co.*, 130 F. (2d) 202, 204 (C. C. A. 7), certiorari denied, 317 U. S. 660; *McQuay-Norris Manufacturing Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 751 (C. C. A. 7), certiorari denied, 313 U. S. 565.[18]

Petitioner failed to comply with this duty. Instead, petitioner bargained with a group of twelve employees. Obviously, as the Board found (R. 289), petitioner's conduct in bargaining as to wages with others than the statutory representative denied the latter its statutory status as the exclusive representative of the unit for purposes of collective bargaining. "Clearly to bargain directly with one's employees is not to bargain with their designated exclusive representative

[18] Cf. Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 13, where it is stated: "Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf after representatives have been picked by the majority to represent all." Cf. also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20: "As a necessary corollary [of majority rule]; it is an act of interference * * * for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining." Additional legislative history of this provision is collected in the Board's brief in *J. I. Case Co.* v. *National Labor Relations Board*, No. 67, this Term, pp. 23–28. For Board decisions holding individual bargaining during the pendency of an exclusive representative to be violative of Section 8 (1) and (5), see *Matter of The Stolle Corp.*, 13 N. L. R. B. 370, 381–382, and *Matter of Schierbrock Motors*, 15 N. L. R. B. 1109, 1113–1115.

* * *." *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 221 (C. C. A. 1). The Board could properly find, as it did (R. 289), quoting from the opinion of the Second Circuit Court of Appeals in *National Labor Relations Board* v. *Acme Air Appliance Co., Inc.*, 117 F. (2d) 417, 420, that such conduct of an employer would "result in nothing but disarrangement of the mechanism for negotiation created by the Act, disparagement of the services of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed purpose of the Act to avoid or mitigate."[19] These considerations fully support the Board's determination that petitioner violated Section 8 (1) and (5) of the Act.

## II

### THE BOARD PROPERLY FOUND THAT PETITIONER'S GRANT OF A WAGE INCREASE IN RETURN FOR ITS EMPLOYEES' ABANDONMENT OF THE UNION VIOLATED SECTION 8 (1) OF THE ACT.

Petitioner does not deny that its grant of the wage increase was intended to and did have the effect of causing its employees to leave the Union. Indeed, petitioner argues that it would have

[19] *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 853 (C. C. A. 7), certiorari denied, 312 U. S. 686; *National Labor Relations Board* v. *Grower-Shipper Ass'n*, 122 F. (2d) 368, 377 (C. C. A. 9); *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. (2d) 875, 881 (C. C. A. 6).

violated "the spirit of the Act" had it refused to give the increase because its refusal would have caused its employees to remain union members and petitioner thereby would have "dictated to its employees in the free choice of their representative" (Br. 14). Petitioner does not explain how it reaches the conclusion that, although a refusal to grant the increase would have dictated to its employees that they should remain in the Union, granting the increase did not dictate to the employees that they should leave the Union. The Board found that petitioner's decision to grant the increase "was occasioned solely by the employees' offer to withdraw from the Union if the raises were granted" (R. 286), that petitioner "was under a duty to refrain from action which would influence the employees to abandon the Union, and its action in granting the increases constituted interference with the self-organizational rights of its employees" (R. 288–289).

To permit an employer thus to influence employees as to self-organization is plainly repugnant to the policies and purposes of the Act. It is well settled that the employer is not permitted to participate in any way in the employees' organizational activities for collective bargaining; such matters are left for decision to the employees alone and the employer is required to "keep his hands off completely and exert no influence over his employees, directly or indirectly in their effort to organize for purpose of collective bargaining."

*National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 301 (C. C. A. 6). The basic premise upon which this well settled rule rests of course is that industrial strife will be lessened and stable industrial relations will most readily be established if employees are entirely free to make their own decisions as to organization and if, accordingly, the representative they select is their "true" representative. It is difficult to conceive of more obvious or direct interference with employees' rights of self organization than the grant by an employer of wage increases in acceptance of the employees' offer to abandon unionization if such increases are granted.[26]

[26] The grant of wage increases for the purpose of interfering with self-organization of employees is a familiar device. E. g.; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 494 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 683 (C. C. A. 8); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. (2d) 263, 266, 267 (C. C. A. 8), certiorari denied February 7, 1944, No. 552, this Term; *National Labor Relations Board* v. *W. A. Jones Foundry & Machine Co.*, 123 F. (2d) 552, 553–554 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 455 (C. C. A. 7), certiorari denied, 317 U. S. 650; *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543–544 (C. C. A. 10), enf'g 13 N. L. R. B. 699, 710–711; *National Labor Relations Board* v. *Fitzpatrick & Weller, Inc.*, 138 F. (2d) 697, 699 (C. C. A. 2).

Petitioner's direct grant of the wage increase in the circumstances of this case was unlawful under another firmly established principle. An employer may not grant wage increases or other concessions directly to his employees during the pendency of negotiations on the subject with an exclusive collective bargaining representative. E. g., *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. (2d) 180, 186 (C. C. A. 4), certiorari denied, 317 U. S. 652; *National Labor Relations Board* v. *H. G. Hill Stores, Inc.*, decided February 10, 1944 (C. C. A. 5); *National Labor Relations Board* v. *Barrett Co.*, 135 F. (2d) 959, 961 (C. C. A. 7); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 38 (C. C. A. 3); *Inland Lime & Stone Co.* v. *National Labor Relations Board*, 119 F. (2d) 20, 22 (C. C. A. 7); *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756, 759 (C. C. A. 7), enforcing 12 N. L. R. B. 1002, 1011; *National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655, 656 (C. C. A. 2), affirmed as modified in other respects, 309 U. S. 350; cf. *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 131, 136 (C. C. A. 7), certiorari denied, 313 U. S. 595. Such action operates no less effectively to undermine collectve barganing than a campaign of coercion and intimidation designed to destroy the majority status of a collective bargaining representative. It plainly disparages the

services of the union, suggests that organization is not necessary, and inevitably induces defections from it. The gravity of the offense is underlined in the instant case by the facts that the employer here had been specifically advised by the employees that they would abandon the Union if wage increases were granted them directly, and that, as the Board found (R. 286), petitioner's determination to grant the increases was "occasioned solely by the employees' offer to withdraw from the Union if the raises were granted." In short, the employer here was assured in advance that such normally interfering tactics would be completely successful, and the grant of the wage increases was made with the deliberate intent of defeating the Union.

Nor is petitioner's conduct permissible because the suggestion originated with the employees. The Board held that in the circumstances of this case it was "immaterial from whence came the impulse to deal directly" (R. 290). It seems almost too clear for argument that the fact that the initial suggestion for petitioner's conduct in the instant case came from the employees does not *per se* mitigate the disruptive effects upon collective bargaining among petitioner's employees, which were its intended consequence. Whatever the source of the idea, petitioner's conduct in dealing directly with the employees and granting them wage increases in acceptance of their offer to abandon the Union in return for such wage increases, de-

cisively influenced their choice, and violated petitioner's duty to "keep his hands off completely and exert no influence over his employees, directly or indirectly, in their efforts to organize for purpose of collective bargaining" (*National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 301 (C. C. A. 6)). Likewise, petitioner's act of dealing directly with a group of employees as to wages, despite the fact that the Union was the recognized designated exclusive agent for such dealing, plainly disrupted the scheme envisaged by the Act, and this, too, without regard to the source of petitioner's impulse to do so.

The courts have uniformly held that "The act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer." *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9).[21] And they have consistently upheld Board

[21] To the same effect see: *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532, 533 (C. C. A. 6); *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, 313 U. S. 582; *National Labor Relations Board* v. *Isthmian Steamship Co.*, 126 F. (2d) 598 (C. C. A. 2); *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. (2d) 553, 557–558 (C. C. A. 3); *Wilson & Co.* v. *National Labor Relations Board*, 123 F. (2d) 411, 417 (C. C. A. 8); *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. (2d)

findings of unfair labor practices despite the employer's contention that the acts or statements which the Board found to be violative of the Act were made in response to questions or suggestions or compulsions by the employees, and were not initiated by the employer.[22] The sense of these decisions is that the employer's conduct is not rendered lawful merely because he may not have been motivated by anti-union animus; the sole test is whether or not his conduct can be squared with or frustrates the Congressional mandate in the Act.

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314 (C. C. A. 9); *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 87 (App. D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 495–496 (C. C. A. 3). See, also, *National Labor Relations Board* v. *J. I. Case Co.*, 134 F. (2d) 70, 71–72 (C. C. A. 7), certiorari granted, No. 67, this Term; *West Virginia Glass Specialty Co.* v. *National Labor Relations Board*, 134 F. (2d) 551, 552 (C. C. A. 4), certiorari denied, No. 97, this Term; *National Labor Relations Board* v. *Thompson Products*, 130 F. (2d) 363 (C. C. A. 6); *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. (2d) 1020, 1022–1023 (C. C. A. 6).

[22] Thus, an employer may not form a company union because his employees ask him to do so. *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 138 F. (2d) 86 (C. C. A. 3), enforcing 41 N. L. R. B. 872, 876, 882–883, petition for certiorari pending, No. 630, this Term; cf.; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532, 533 (C. C. A. 6); *National Labor Relations Board* v. *Metal Mouldings Corp.*, decided April 6, 1943 (C. C. A. 6), enforcing as modified 39 N. L. R. B. 107, 120–123; see also *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685.

## III

### THE BOARD PROPERLY FOUND THAT PETITIONER'S REFUSAL TO BARGAIN WITH THE UNION UPON THE GROUND THAT THE UNION HAD LOST ITS MAJORITY AFTER THE GRANT OF THE WAGE INCREASE CONDITIONED ON ABANDONMENT OF THE UNION, VIOLATED SECTION 8 (1) AND (5) OF THE ACT

Petitioner admittedly refused to bargain with the Union on June 9, on the ground that a sufficient number of employees had allegedly withdrawn from the Union as a consequence of petitioner's direct grant to them of wage increases earlier that day, so as to destroy the Union's majority status (*supra*, p. 9). Assuming that a sufficient number of employees did in fact revoke their designation of the Union so as to impair the Union's majority,[23] the Board properly held that such defections "cannot operate to destroy the exclusive representative status of the Union previously established by the untrammelled will of the majority of the employees in the unit," and

[23]As has been noted (*supra*, pp. 7, 12, fn. 14), the Board found (R. 287) that the employees had not withdrawn their designation of the Union as their representative prior to June 9 and that even then only 4 of the 18 who had joined the Union informed the organization that they no longer desired to be represented by it. However, the Board apparently did not rely upon this fact in concluding that petitioner's subsequent conduct was unlawful but held that the conduct was unlawful "even assuming that a number sufficient to destroy the majority had repudiated the Union before June 9" (R. 290). Accordingly, we make the same assumption in this argument.

to excuse petitioner from its duty to bargain with that representative (R. 290).

The alleged defections from the Union on which petitioner relies were induced, as the Board found (R. 290), by petitioner's action in dealing directly with the employees and granting them wage increases. This action constituted an unfair labor practice. We have already demonstrated the impropriety of petitioner's direct bargaining with the employees after they had designated an exclusive representative for such purpose (pp. 17–23, *supra*). We have likewise demonstrated the unlawfulness of the conduct resulting in the wage increase (pp. 23–29, *supra*).

It is well settled that defections from a Union which have been induced by the employer's unlawful practices "are not effective either to change the bargaining representative previously chosen or to excuse [employers] from their duty to bargain in good faith with that representative." *National Labor Relations Board* v. *Dixie Motor Coach Corp.*, 128 F. (2d) 201, 202 (C. C. A. 5); *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 340; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82. Accordingly, the Board properly found (R. 290) that petitioner's refusal to bargain with the Union on June 9 may not be excused by reliance upon alleged defections induced by petitioner's direct

dealings with the employees and grant of wage increases, and a clear violation of Section 8 (1) and (5) of the Act is presented independently of the considerations previously discussed.

## IV

### THE BOARD PROPERLY ORDERED PETITIONER TO BARGAIN COLLECTIVELY WITH THE UNION AS A REMEDY FOR ITS UNFAIR LABOR PRACTICES

As a remedy for its unfair labor practices the Board ordered petitioner to bargain collectively with the Union (R. 294–295). While petitioner has not either in its petition for certiorari or in its brief, presented any question as to the propriety of the order, should the Board's findings respecting the unfair labor practices be sustained, nevertheless petitioner without arguing the point asserts that due to a turnover of personnel the Union no longer represents a majority of the employees in the appropriate unit (Br. 6).

Petitioner's claim (*ibid.*) that only one of the 18 employees who had joined the Union is still in petitioner's employ is based on no evidence either presented or offered before the Board but rests solely on an assertion made in petitioner's answer to the petition for enforcement (R. 317). Petitioner never moved for leave to adduce such evidence. Before the Board it did offer to prove that eight of the 26 employees who had been in the unit at the time of the unfair labor practices were

no longer working for it. However, petitioner did not offer to prove that any of the eight employees had been replaced by other employees, nor how many employees were in the unit at the time of the hearing, nor how many of them in fact were not union members. Of the eight employees as to whom petitioner offered evidence, one, Scott, had never been in the unit nor a union member (R. 193–194, 152–153, 228–229); another, Sternberg, was never a union member (R. 194, 228–229); five of the remaining six were in the armed forces of the United States (R. 194) and therefore still within the unit under the Board's uniform decisions.[24] Thus, petitioner's offer of proof, even if accepted as true, would not have established that the Union had lost its majority status by a turnover of employees.

The Board considered petitioner's contention that the Union had ceased to represent a majority of the employees by reason of a turnover and decided that even if such were the case, it did not warrant withholding its normal order directing petitioner to remedy its refusal to bargain by bargaining collectively with the Union (R. 291–292). The Board stated that it was necessary, in order to effectuate the policies of the Act, to restore as nearly as possible the *status quo* existing before

[24] *Matter of Cudahy Packing Co.*, 29 N. L. R. B. 830, 835, 836; *Matter of Marcalus Mfg. Co., Inc.*, 33 N. L. R. B. 107, 111 n., 112; *Matter of Rudolph Wurlitzer Co.*, 41 N. L. R. B. 1074, 1076, 1077.

the unfair labor practices were committed, and that it was to be assumed that, absent petitioner's unfair labor practices, "the Union would have been able to obtain as members at least some of the new employees and would have maintained its majority status despite the turnover of personnel" (R. 292). The court below, citing the decision of this Court in *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513, enforced the order. It stated: "That the union may have lost its majority since the employer refused to bargain does not authorize us to direct a new election; that was a matter for the Board to determine, and it has done so" (R. 307). We believe that the order of the Board, thus enforced by the court, was permissible.

The propriety of the challenged portion of the Board's order is fully disposed of by the decisions of this Court in the *Lorillard* and *Machinists*[25] cases. In the former, the employer resisted the Board's bargaining order upon the alleged basis that after commission of the unfair labor practices but before the Board's decision, the labor organization with which the employer had refused to bargain had lost its majority status for reasons asserted to be unrelated to the employer's unlawful acts. Essentially, this is petitioner's contention in the instant case. In the *Lorillard* case, the

[25] *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72.

Circuit Court of Appeals for the Sixth Circuit had held that "lapse of time and the change in the conditions" caused by other factors than the employer's refusal to bargain "demonstrate that the union may no longer represent a majority" (117 F. (2d) 921, 925). It therefore conditioned enforcement of the Board's bargaining order upon the holding of an election to determine whether "the union now represents a majority." This, likewise, is the relief sought by petitioner in the instant case. This Court reversed the ruling of the circuit court of appeals in the *Lorillard* case, stating in a *per curiam* opinion:

> The Board had considered the effect of a possible shift in membership, alleged to have occurred subsequent to Lorillard's unfair labor practice. But it had reached the conclusion that, in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine, and the court below was in error in modifying the Board's order in this respect. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340; *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 82. * * *

In the *Machinists* case, the employer likewise claimed that the union with which it had refused to bargain had lost its majority status after the

refusal, not because of its unfair labor practices, but because of an intervening jurisdictional strike (Record, No. 16, October Term 1940, pp. 12–13). This Court said that it was entirely proper for the Board to refuse to conduct an election or otherwise notice the alleged loss of majority, since such claims were matters for determination in certification proceedings under Section 9 of the Act "after unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S., at 83). In addition, after pointing out that it was for the "expert judgment" of "the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged," the Court stated (311 U. S., at 82):

> It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates. Hence the failure of the Board to recognize petitioner's notice of change was wholly proper. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340.

In the present case, in accord with the practice sustained in the *Lorillard* and *Machinists* decisions, the Board, as has been noted (pp. 12–13, 33–34, *supra*), found that (R. 292):

> It was the [petitioner's] act in dealing with its individual employees which occasioned the initial defections from the Union * * *. It cannot now be permitted to evade its duty to bargain with the Union by reason of the fact that new employees, who are not shown to be members of the Union, have since been hired to replace some of those who were members of the Union. We assume that, absent the unfair labor practices of the [petitioner], the Union would have been able to obtain as members at least some of the new employees and would have maintained its majority status despite the turnover of personnel. In any event, in order to effectuate the policies of the Act, we must restore, as nearly as possible, the *status quo* before the unfair labor practices were committed.

It is thus apparent, we think, that the Board's findings and bargaining order are in exact accord with the *Lorillard* and *Machinists* decisions.[26]

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[26] The circuit courts of appeals have uniformly so interpreted the *Lorillard* decision. In addition to the holding of the court below in the instant case, see *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. (2d) 989 (C. C. A. 1), petition for certiorari granted, No. 521, this Term; *Great Southern Trucking Co.* v. *National Labor Relations Board*,

Those holdings proceed upon the rationale that employees join unions in order to secure collective bargaining. Consequently, whether or not the employer bargains lawfully with a union chosen by the employees is normally decisive of its ability to secure and retain members, and an unremedied refusal of an employer to bargain collectively with an appropriate labor organization discourages employee adherence to and affiliation with that organization. While this discouraging effect is operative, the precise or probable weight of other factors which might be thought to obscure or destroy the representative status of the union cannot be isolated and separately evaluated. And an order to bargain is necessary and appropriate to eradicate the effects of the prior unlawful conduct.

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decided January 10, 1944 (C. C. A. 4, on contempt); *National Labor Relations Board* v. *A. Sartorius & Co., Inc.*, decided January 31, 1944 (C. C. A. 2); *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618, 621 (C. C. A. 6); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, 138 F. (2d) 840 (C. C. A. 6). See also *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 494–499 (C. C. A. 3), certiorari denied, 315 U. S. 797; *National Labor Relations Board* v. *Poultrymen's Service Corporation*, 138 F. (2d) 204 (C. C. A. 3). Cf. *National Labor Relations Board* v. *Karp Metal Products Co.*, 134 F. (2d) 954 (C. C. A. 2). Pursuant to the remand in the last case, the Board made Supplemental Findings of Fact, 51 N. L. R. B. 621, whereupon its order was enforced on October 23, 1943, by the Circuit Court of Appeals for the Second Circuit without opinion. A petition for certiorari is pending, No. 602, this Term.

This rationale is not rendered inoperative by the circumstance that the majority is apparently lost, as in the instant case, not only by defections of the original union members but also by the fact that new employees, recruited after the unfair labor practices were committed, allegedly failed to join the Union. In themselves, these alleged facts do not warrant an inference that the restraints engendered by the employer's illegal conduct are no longer operative. For unremedied unfair labor practices exercise a coercive effect not only upon the immediate victims, but upon future employees as well. Whether the loss of majority be attributable to the defections of old members or the failure of the newly hired employees to join the Union, it is clear that it might not and normally would not have occurred if the representative had been treated by the employer in accordance with the requirements of the statute.

In the present case petitioner does not show and there is no possible way of showing that the Union would not have been able to maintain its majority status if petitioner had in the first instance complied with the statute. Indeed, petitioner does not even suggest that the asserted indifference of the new employees to the Union arises from circumstances unrelated to its unfair labor practices. On the other hand, it is fair to assume, as did the Board (R. 292), that had petitioner dealt with the Union as it was required

by law to do, the Union would have been able to recruit the support of the new personnel. It was within the province of the Board to draw this factual inference; since there was plainly "a rational basis for the [Board's] conclusion," the Court will not look behind it. *Dobson* v. *Commissioner*, No. 44, decided December 20, 1943, and cases cited.

No reason is offered by petitioner and none suggests itself why a contract, the normal end product of the collective bargaining process, would not have been consummated. Moreover, the continued recognition and dealing with the Union would itself have afforded the Union a powerful impetus toward further organization, for, as this Court has pointed out (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267), "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees * * *." Two authorities in the field of labor relations have stated:

> Where labor turnover is high the union's majority may be diluted rapidly by a continued influx of nonunion men into the plant * * *. Union officers generally appear to believe, however, that this inadequacy is not serious. When the union has no strong rivals in the plant, when it commands a safe majority, and when it

> enjoys contractual relations with the employer, it is usually not very hard to persuade a majority of new employees to sign up.[27]

And quite naturally, new employees coming to work for petitioner would be far more reluctant to join the Union in the present circumstances than they would if it were operating as a "going concern" in bargaining with petitioner.

In short, it would be arbitrary to assume that the Union could not command sufficient support among the new employees to sustain itself, if petitioner had dealt with it as the statute required and the Union had thus continued to operate as a "going concern" among the employees. Since, however, petitioner, by its unlawful conduct, created an atmosphere which made normal growth of the Union impossible, it may not now resort to its labor turn-over as a bar to a bargaining order. Only by such order is complete cancellation of the employer's unlawful conduct achieved and the unfair labor practices eradicated as from the

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[27] Reynolds, Lloyd G., and Killingsworth, Charles C., *The Union Security Issue*, Annals of the American Academy of Political and Social Science, vol. 224, Nov. 1942, pp. 32, 38. See also Feller, Alexander, and Hurwitz, Jacob E., *How to Deal with Organized Labor* (N. Y. 1937), pp. 6–7; Cummins, E. E., *The Labor Problem in the United States* (N. Y. 1935), p. 207; Stein, Emanuel, and Davis, Jerome, *Labor Problems in America* (N. Y. 1940), p. 664; Slichter, Sumner, *The Government and Collective Bargaining*, Annals of the American Academy of Political and Social Science, vol. 178, March 1935, pp. 107, 116.

beginning. A contrary holding would permit an employer to profit from the fruits of his own unfair labor practices, would give full scope to unfair labor practices in achieving their intended result, and would substantially hinder the development of genuine collective bargaining.

No valid contention may be made that to require present bargaining with the Union is to saddle upon the employees a bargaining representative which they may not desire. Until the Board's order has been faithfully carried out, the employees' real desires are "matters of speculation and argument." *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 872 (C. C. A. 5), certiorari denied, 310 U. S. 651. The Board's order does not grant to the Union a permanent status as the bargaining agent, or status for any fixed period of time. On the contrary, should the employees, after conditions permitting a free choice have been restored by compliance with the Board's order, really desire a different representative, they may readily secure one. As this Court noted in the *Machinists* case, the Act itself assures that the employees will not have an unwanted representative, for Section 9 provides "adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S. at 83).

## CONCLUSION

For the forgoing reasons, it is respectfully submitted that the decision below should be affirmed.

CHARLES FAHY,
*Solicitor General.*

ALVIN J. ROCKWELL,
*General Counsel,*
RUTH WEYAND,
DAVID FINDLING,
*Attorneys,*
*National Labor Relations Board.*

FEBRUARY 1944.

# APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) are as follows:

## FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by

encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the

United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken

before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

U. S. GOVERNMENT PRINTING OFFICE 71544

# SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1943.

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| Medo Photo Supply Corporation, Petitioner, vs. National Labor Relations Board. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[April 10, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner recognized a labor union as the bargaining representative of its employees. At their request and upon their statement that they were dissatisfied with the union and would abandon it if their wages were increased, petitioner negotiated with them without the intervention of the union, granted the requested increases in wages and thereafter refused to recognize or bargain with the union. The only questions raised by the petition for certiorari are whether in the circumstances, petitioner's negotiations with its employees, its payment of increased wages, and its refusal to bargain with the union constituted unfair labor practices in violation of §§ 8(1) and (5) of the National Labor Relations Act, 29 U. S. C. §§ 158(1) and (5).

Upon complaint of the National Labor Relations Board charging petitioner with unfair labor practices, issued pursuant to § 10 of the Act, 29 U. S. C. § 160, the Board found that petitioner had violated §§ 8(1) and (5) of the Act by interfering with its employees in the exercise of their rights to bargain collectively, guaranteed by § 7 of the Act, 29 U. S. C. § 157, and by refusing to bargain with a union representing its employees. The Board entered the usual order directing petitioner to cease the unfair labor practices so found, and requiring it to bargain with the union. 43 N. L. R. B. 989. On the Board's petition to enforce its order, the Court of Appeals for the Second Circuit overruled petitioner's contentions that the union, at the time of the alleged unfair labor practices, no longer represented petitioner's employees for purposes of collective bargaining and directed compliance with the order. 135 F. 2d 279. We granted certiorari,

320 U. S. 723, as the case involves questions of importance in the administration of the National Labor Relations Act.

The Board made findings supported by evidence that after eighteen of the twenty-six employees in petitioner's shipping and receiving department, constituting an appropriate bargaining unit, had designated the union as their bargaining agent, petitioner, on June 4th and 5th, 1941, recognized it as the exclusive bargaining representative of the employees. The union having proposed a contract providing for an increase of wages for the employees, petitioner agreed to meet the union representatives on June 9, 1941 in order to begin collective bargaining.

Two days before that date, twelve of the employees who were members of the union, waited on petitioner's manager and stated that they and the six other members had no desire to belong to the union if through their own efforts they could obtain wage increases, a list of which they submitted. The manager, at that time, declined to discuss the union, but stated that he would consider the request for wage increases with petitioner's president on the latter's return to the office on June 9th, and asked the employees to return on that day.

On June 9th, the manager, after a conference with the president, met with a committee of four of the employees who had conferred with him two days before. He advised them that petitioner would grant substantially the requested wage increases. The committee then withdrew to convey this message to the other employees, who thereupon agreed to accept the wage increases. The committee returned to inform the manager of this and that the employees "felt that they did not need the union, and we would rather stay out". Later in the day, the committee notified the union representative that the employees no longer desired the union to represent them. At a meeting on the same day with the representatives of the union, at which this committee was present, petitioner's attorney stated that he understood that the union no longer represented a majority of the employees and he declined to negotiate with it unless it were established by an election that it did.

From this, and from evidence which it is unnecessary to detail, the Board concluded, and we accept its findings, that the employees had not revoked their designation of the union as their bargaining agent before the wage increases were promised by petitioner's

manager on June 9th; that the increases were induced by negotiations begun with petitioner on June 7th and concluded on June 9th before they had repudiated the union; that petitioner's determination to increase wages was "occasioned solely by the employees' offer to withdraw from the union if the raises were granted"; and that the employees' defection from the union was induced by petitioner's conduct in dealing directly with the employees.[1]

In sustaining the Board's order the Court of Appeals assumed that as there had been no election or certification of the union as their bargaining representative, the employees were free to revoke their designation of it and to negotiate directly with the employer for an increase in wages, without the intervention of the union. But it thought that if such a proposal came from the employer, it would be a forbidden interference with the collective bargaining process and it concluded that, in view of the difficulties of determining whether in fact such an offer, ostensibly coming from the employees, was induced by the employer, the Board could conclude that the mere acceptance by the employer of the employees' offer was an unfair labor practice. A concurring judge thought that the case was stripped of any intimation of employer control but that the Board's order should be sustained on the ground that it was an unfair labor practice for the employer to bargain with the employees when their revocation of the union's authority was made conditional upon the majority's agreement to abandon collective bargaining altogether, even for an unspecified time.

We think it plain that the findings of the Board do not admit of either of these dispositions of the case. While the negotiations of petitioner with the employees resulted in a wage increase and their abandonment of the union, the negotiations were carried on by certain of the employees purporting to act in behalf of and

[1] It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law the experienced judgment of the Board is entitled to great weight. See Franks Bros. Co. v. Labor Board, No. 521, decided this day; Labor Board v. Southern Bell Co., 319 U. S. 50, 60, and cases cited; Labor Board v. Nevada Copper Co., 316 U. S. 105, 106-107, and cases cited; cf. Dobson v. Commissioner, 320 U. S. 489, 501, and cases cited.

to represent a majority. Nothing appears which would suggest, as the concurring judge thought, that any of the employees during or as a result of the negotiations had by agreement or otherwise foreclosed themselves from continuing such bargaining through the same or any other representatives whom they might choose. Nor in the circumstances disclosed by the evidence and the Board's findings can we say that it was of any significance whether, as the Court of Appeals thought, the employees' offer to abandon the union originated with them or was inspired by the employer. For in either case, as will presently appear, we think that the negotiations by petitioner for wage increases with any one other than the union, the designated representative of the employees, was an unfair labor practice. We think that the Board's order should have been enforced for the reasons stated by it.

The petition for certiorari does not challenge the Board's findings that the union represented a majority of the employees in petitioner's shipping department, and that they constituted a proper bargaining unit and that petitioner had agreed to bargain with the union. The evidence shows and the Board found that when the employees opened their negotiations with petitioner's manager on June 7th, they had not repudiated the union. On the contrary they made it plain that their proposal for its abandonment was contingent upon petitioner's willingness to give the desired wage increases. The evidence also shows, as the Board found, that the employees did not withdraw their designation of the union as their bargaining representative until after they had voted to accept the wage increases, and that until then, they had held themselves out as union members throughout their negotiations with petitioner and its representatives.

The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, 29 U. S. C. § 159(a), it exacts "the negative duty to treat with no other". *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 44; and see *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 548-549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8(1) of the Act, which forbids interference with the right of

employees to bargain collectively through representatives of their own choice.

That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co.* v. *Labor Board*, No. 67, 1943 Term; cf. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, No. 343, 1943 Term, both decided February 28, 1944; see also *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 359-361. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8(1) of the Act.[2] There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation. Compare *Labor Board* v. *Century Oxford Mfg. Co.*, — F. 2d —, C. C. A. 2d, decided February 15, 1944. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation. And it is the fact here, as found by the Board, that the employees did not revoke their designation of the union as their bargaining agent at any time while they were themselves negotiating with petitioner, and that they left the union, as they had promised petitioner to do, only when petitioner had agreed to give them increased wages.

Quite apart from the Board's finding of an unfair labor practice in petitioner's direct negotiations with its employees when

[2] That the Act "carries the clear implication that employers shall not interfere" with the right of collective bargaining "by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all", was recognized by the reports of the Congressional committees recommending the adoption of the bill which became the National Labor Relations Act. Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

they had not revoked their designation of the union, there can be no question but that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union.[3] *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 460-461. This violation of § 8(1) was in itself sufficient to support the Board's order to cease and desist. The words and purpose of §§ 7 and 8(1) of the Act enjoin an employer from interfering with, or coercing, its employees in their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination. *International Ass'n of Machinists* v. *Labor Board*, 311 U. S. 72; *Labor Board* v. *Falk Corp.*, *supra*; *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266-268.

Petitioner contends that it would be equally an unfair labor practice to refuse the wage increases as to grant them, for that would influence the employees to stay in the union, instead of abandoning it. But either consequence, as well as any violation of the Act, would in this case have been avoided if the employer, as is its statutory duty, had refused to negotiate with any one other than the duly designated bargaining representative of his employees. We are not now concerned with the question whether, in other circumstances, such action would have been an unfair labor practice. Nor does that possibility relieve petitioner of the consequences of its unfair labor practices which the Board has found.

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[3] We find no evidence in the record that petitioner's representatives stated to the employees either in terms or in substance, "We will give you the [wage] increases *and you can do as you please about the union*". From the evidence, which fully supports the findings, it appears that the employees proposed to petitioner's manager on June 7th that they would leave the union if they were given wage raises; that the manager adjourned the meeting with the employees until June 9th in order to consider the suggested wage increases with petitioner's president. On that date, after considering the matter with the president, the manager announced to the employees that wage increases would be given, and this was immediately followed by the employees' desertion of the union. It also appears that it was petitioner's normal practice to grant wage increases only at the close of the year. From these facts the Board could conclude, as it did, that the purpose and the effect of the wage increases was to induce petitioner's employees to leave the union.

Petitioner was not relieved from its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, *Labor Board* v. *Newport News Co.*, 308 U. S. 241, 251, or the employees suggest the conduct found to be an unfair labor practice, *National Licorice Co.* v. *Labor Board, supra*, 353, at least where the employer is in a position to secure any advantage from these practices, *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. 514, 519-521, and cases cited.

Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339-340; *International Ass'n of Machinists* v. *Labor Board, supra*, 82; cf. *National Licorice Co.* v. *Labor Board, supra*, 359. Petitioner's refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of §§ 8(1) and (5) of the Act.

The Board rightly determined that petitioner had engaged in the unfair labor practices which the Board found, and this determination supports its order directing the cessation of those practices. The petition for certiorari has raised no question as to the propriety of the Board's order directing petitioner to bargain with the union, which was also sustained and ordered enforced by the Court of Appeals. We therefore have no occasion to consider that part of the order here. Compare *Franks Bros. Co.* v. *Labor Board*, No. 521, decided this day.

*Affirmed.*

Mr. Justice ROBERTS dissents.

# SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1943.

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|---|---|
| Medo Photo Supply Corporation, Petitioner, vs. National Labor Relations Board. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[April 10, 1944.]

Mr. Justice Rutledge, dissenting.

I dissent. The story told by this record is not of a dominating or intermeddling employer, interfering with employees in their collective bargaining arrangements or activities. It is rather of one which sought to do no more than meet its employees' wishes, freely formed and freely stated; and at the same time to be sure it would do nothing to violate the law governing their relations. The record is barren of any evidence of trouble or real dispute between Medo and its employees, of hostility by Medo to unions or employee organization, or of any refusal to bargain collectively as the statute requires.[1] On the contrary, it shows without contradiction that Medo regarded these things as wholly for the employees to settle among themselves; that it scrupulously sought to keep hands off; and that it was willing to bargain with them by whatever agency they might select. These attitudes were qualified only by the company's desire to be sure that the union was entitled legally to represent the employees and to avoid being caught in a possible jurisdictional dispute between the A. F. of L. and the C. I. O.[2]

The Board has found that Medo was guilty of unfair labor practice in three respects: (1) in dealing directly with the employees, rather than through the union, on June 7 and 9; (2) in refusing to deal with the union; (3) in granting the increased wages sought by the employees. On the facts, (1) and (2) come

[1] There was no refusal to bargain with the union until June 9, 1941, after the employer and the employees had reached a full agreement. Cf. note 6 *infra*.

[2] Cf. note 5 *infra*.

to the same thing, that before June 7 the union had acquired legal status as exclusive bargaining agent, which was effective to require Medo to deal only with it, and that this was not validly revoked then or later. The same things are subsumed by (3), which however poses the further question whether granting the increase in itself was an unlawful interference. The questions thus presented may be pictured more accurately in the light of further facts.

There is no evidence of labor trouble or employee dissatisfaction prior to May, 1941. On the contrary, for all that appears, relations were peaceful and harmonious. During that spring the A. F. of L.[3] put on a campaign to organize all photographic supply stores in New York. In May it got around to Medo. The company had about 70 employees. Of these, about 25 or 26 (including some supervisory employees) were in the shipping and receiving department, doing manual labor in the plant's basement. The others were clerical employees and salesmen, working upstairs. Stoltman, the A. F. of L. organizer, started out in May to organize all of Medo's employees in a single unit. Apparently he was not successful upstairs. But by May 23 he had signed up 18 of the downstairs men. He and they then decided to limit the unit to the basement, and requested the employer to negotiate. At the same time the union applied to the Board for certification. There was some short delay, owing to the absence of Medo's president over the Memorial Day holiday. But on June 4, at the Board's arrangement, the first conference concerning recognition was held.[4] Several followed between that time and Saturday, June 7, when the employees intervened for themselves.

At all times Medo showed willingness to negotiate. But it also wished to be sure, as it had both the right and the duty to be, that the unit was appropriate and the union had a majority of the employees.[5] Medo further wanted to know something about

[3] Acting through the American Federation of Photo Employees Union, Local 21314, of which Stoltman, chief union figure in this case, was president.

[4] The Board's part in bringing about the conference was due solely to the union's having applied to it for certification simultaneously with the making of its first demand upon Medo to negotiate with it, not to any refusal by Medo to negotiate concerning recognition.

[5] It felt, as Stoltman did at first, that there should be one unit in the small plant and was fearful of becoming involved in a jurisdictional dispute if the A. F. of L. should organize the unit downstairs and the C. I. O., which was actively organizing such units, should come in and organize the clerical and sales employees working upstairs.

The union clearly had a majority of the claimed unit from May 23 to June 7, since 18 of the 25 or 26 employees embraced in the unit had signed member-

the terms the union would demand, if recognized; not wishing, as it said, to "buy a pig in a poke." All of these things were matters of discussion between Stoltman and various company representatives in the conferences held on June 4 and 5. But it was not until the latter date that Stoltman finally submitted his substantive demands to Medo through Seligsberg, its attorney.

The Board's findings, in effect, are that on June 5 Seligsberg, in this conference with Stoltman, conceded finally all questions of representation, that is, of appropriateness of the unit and the union's majority status. Hence it concluded Medo then recognized the union as collective agent and, consequently, the only thing remaining for further discussion was the terms of the collective agreement. This finding is the basis for the Board's conclusion that Medo was guilty of unfair labor practices when it later dealt directly with the employees rather than through the union. Medo, however, says that all three questions remained open for final action by it at the conference scheduled for Monday, June 9, but not held because the employees intervened directly in their own behalf on Saturday, June 7.[6]

Seligsberg made particular statements in his conference with Stoltman on June 5 which, if disconnected from the context of the whole conversation and treated as in themselves stating the employer's entire position, could be taken as indicating intention to close the discussion on appropriateness of the unit and the

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ship application cards and none had revoked his application or membership in that period.

The company, however, had to take Stoltman's word for this. It asked him for proof that his union represented a majority, but he declined to submit it, saying he would submit the cards only to a Board representative. The record does not show that Medo ever was given proof that the union had lined up its claimed and actual majority. This was one of the things which, in my opinion, the record shows was held for discussion and determination at the conference scheduled for June 9. Cf. text *infra* notes 6-10.

[6] It is undisputed that the employees, entirely of their own motion and without any stimulus or suggestion by Medo, on Saturday morning, June 7, sought a conference with Medo's officials, without disclosing their purpose. The request was granted and the conference held Saturday afternoon. As it opened one of the men mentioned the "union situation." But Medo's general manager, Hoppin, at once and flatly declined to discuss that, saying he would discuss anything else. The men then stated their desire for an increase in wages, and not to have the union. They specified the wages sought and Medo's reply, granting them in part, was given the following Monday morning, June 9. On Monday afternoon there was also a conference with Stoltman, but because of the turn events had taken by the employees' intervention it served only as the occasion for notifying him that Medo and the employees had reached agreement and therefore the company would not deal further with the union.

union's majority status. These statements are the Board's only foundation for finding that Medo at any time conceded recognition to the union with finality. In my opinion it would do violence to the facts to regard them as sufficient to sustain these findings. The employer was entitled to a reasonable time for ascertaining the union's status before dealing with it[7] and this had not expired on June 7 or, for that matter, on June 9.[8] Prior to June 5 all questions were open. The conference then was not begun, carried through or concluded with any intention or purpose that understandings which might be reached were or could be taken to be final. Medo's representative was doing a lawyer's job,[9] which was to see how far he and Stoltman could agree on terms to be considered by his client as a basis for final decision. They had been successful previously in bringing other employers and employees together in more difficult disputes and the whole intent of their conference was to find a basis of possible agreement upon all matters, including representation,[10] for consideration by

[7] Cf., e. g., North Electric Mfg. Co. v. National Labor Relations Board, 123 F. 2d 887 (C. C. A.); Texarkana Bus Co. v. National Labor Relations Board, 119 F. 2d 480, 484 (C. C. A.). See also National Labor Relations Board v. Union Pacific Stages, Inc., 99 F. 2d 153, 158-159 (C. C. A.).

[8] It is to be recalled that the whole period from demand by the union on Medo to negotiate to the time the employees intervened extended only from May 23 to June 7, and that the period of active negotiation began on June 4. Three days, or even a little more than two weeks, is hardly too much under the circumstances here present to allow an employer for determining whether the union meets the statute's requirements.

[9] Seligsberg's testimony was: "That was the purpose of the postponement. They were to bring us proof of representation. We were both to study the question of the unit, and we were to study it—and when I say 'we,' I mean the employer, because *except as to language*, I wouldn't know anything about it. They were to study it. Mr. Hoppin and Mr. Goodfield and Mr. Niemeyer, if he were there—which I don't remember—were to study the proposed terms and see how they compared with the possibilities." (Emphasis added.) Seligsberg consistently testified that he and Stoltman considered "all three questions together, proof of majority, proof of unit, and the contract." He was a director and secretary of the company, but not a shareholder.

[10] In the conference Seligsberg renewed a previous request for proof that the union had a majority and conditioned the discussion upon the company's being satisfied in this respect and that the unit was appropriate. Cf. note 9 *supra*. However, Stoltman again refused to exhibit the cards and renewed his offer only to submit them to a Board representative for comparison with Medo's payroll. The record does not show this was ever done, although in my opinion, contrary to the Board's findings, it does show conclusively that the parties contemplated it would be done and that the result of the comparison would be given to Medo before the negotiations should be concluded with finality of recognition.

Medo for its final decision and with a view to further discussion and possible final settlement in the conference agreed upon for June 9. To tear Seligsberg's statements out of this setting and context and make of such tentative understandings or bases of further negotiation final concessions of recognition is to draw inferences wholly unwarranted by the record. It is therefore not at all clear that on June 7 negotiations had passed beyond the stage of recognition or, consequently, that the union then was legally entitled to act as exclusive bargaining agent.

But even assuming that Medo on June 5, through Seligsberg, conceded recognition, still I cannot agree that it committed any unfair labor practice, under the facts shown here, either in merely hearing what the employees had to say or, after declining to be drawn into discussion of their relations with the union,[11] in granting unconditionally their freely made and wholly uncoerced request for an increase in wages. In my view it is immaterial that this, in effect, short-circuited the union, for two reasons. One is that, under the special circumstances, the employees had the right to revoke the designation and did so by undertaking to deal for themselves; the other, which is perhaps but a different way of stating the first, is that the union itself had no right or interest sufficient to prevent them from doing so.

At most the employer did nothing more than accede to the wishes of a clear majority, both in listening to their request and in granting it. There is no claim or semblance of proof that Medo induced the men to make the request. On the contrary, it is not disputed that, when they asked for the conference on June 7, the request came unexpectedly to Medo. And when, at the start of the conference the men mentioned the union situation, Medo's general manager, Hoppin, stated at once and flatly that he would not discuss their union affairs or relations with them, clearly implying that this was their business exclusively, not the company's.[12] Asked whether he would discuss other matters, he

[11] Cf. note 6 *supra*.

[12] Cf. note 6 *supra*. Hoppin's testimony was in response to the question "What happened after they came to your office?" (on Saturday afternoon): "They came up and said that 'We have decided that we don't want to have anything to do with the union.' I immediately stopped them, and I told them that if there was anything at all pertaining to any union activities, I did not want to listen to them at all, but if it was anything else they had to offer, I would be willing to listen to them."

answered affirmatively. The men thereupon said they wanted the increase and there is some evidence they also said unconditionally that they did not want the union.[13] The Board, however, has found that they coupled the two statements conditionally, namely, that they did not want the union, if they could have the increase without it.

The Board concluded that Medo's action on June 9 in granting the increases, though less than what were requested, "constituted interference with the self-organizational rights of its employees," on the theory that this influenced them to abandon the union. It also held that the employees' action in approaching the company on June 7 did not "constitute an implied revocation of their designation of the Union so as to relieve the respondent of the obligation to deal solely with it," and therefore dealing directly with them was a violation of Medo's statutory duty to the union and an unfair labor practice. The Board's theory was, apparently, that the men, to revoke their designation, were required to communicate the revocation to the union and that the union had acquired such an interest or status no other act could terminate the agency, however inconsistent with its continued existence and exclusive character.

The statute makes no provision that the agency, once created, shall continue for any specific time. It prescribes no particular method for terminating, as it makes none for creating,[14] the agency. Greater formality hardly would seem to be required in the one case than in the other. The statute purports to be drawn in favor of protecting the interests of employees, not those of unions as such.[15] True, while the agency exists it is exclusive for its appropriate purposes. But it is so only while it does exist and the question here is whether it continued in force after the

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[13] Hoppin testified he was told: "We have one thing that we are primarily interested in. The working conditions here are excellent. We are very happy with our jobs, but we would like to get more money."

[14] Cf. Lebanon Steel Foundry v. National Labor Relations Board, 130 F. 2d 404 (App. D. C.).

[15] Whatever justiciable "interest" the union may have in continuing to act as the employees' representative, its status as such is for the principal's benefit, not its own, and is terminable at the former's will. Cf. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 237; National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332, 344; National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 261-262; National Labor Relations Board v. Remington-Rand, Inc., 94 F. 2d 862, 869-870 (C. C. A.); National Labor Relations Board v. Lion Shoe Co., 97 F. 2d 448.

employees took matters into their own hands and showed to the employer by that act that they wanted to deal for themselves, not through the union.

The Board implies and the Court says the employer should have declined to discuss with them any matter which was appropriate for collective bargaining, since the union was their agent for this purpose. Therefore, it is concluded, the employer violated their rights under the statute to bargain collectively. This, although it is conceded the twelve employees spoke for 18 of the 25 or 26 in the unit and it does not appear that what they did was disapproved or repudiated by the other six or seven. Merely to state this proposition should be enough to negate it. For it preserves rights of employees to bargain by representatives of their own choosing by destroying them. In all normal agency relations, except those "coupled with an interest,"[16] the principal can revoke them by exercising the agency himself.[17] He need not notify the agent. When he acts on his own behalf, he exhausts the subject matter of the agency and it comes to an end.

Unless a designated union acquires, by its selection, a thraldom over the men who designate it analogous to the power acquired by one who has a "power coupled with an interest," unbreakable and irrevocable by him who gave it, it would seem that any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves. And this should be true, whether or not previous notice is given to the union and whether or not the subject matter of the resumption may include, as one consequence of the dealing, the possible continuance of the agency. For it is the very taking back of the right to deal with their employer, not what he does in response to this, unless that creates some new pressure or influence not contemplated in the employees' freely made proposals, that shows the intent to destroy the agency. Dealing for themselves and dealing exclusively through the agent cannot coexist. The one wholly excludes the other and the real question becomes, which is to prevail, the

[16] See, e. g., Hunt v. Rousmanier's Administrators, 8 Wheat. 174; Lake Mortgage Co. v. Crenshaw, 93 Cal. App. 411; Hall v. Bliss, 118 Mass. 554; Note (1930) 39 Yale L. J. 110.

[17] See, e. g., Ahern v. Baker, 34 Minn. 98; Mott v. Ferguson, 92 Minn. 201; White & Hoskins v. Benton, 121 Iowa 354; Gilbert v. Holmes, 64 Ill. 548.

agent's interest and right or the principal's, the union's or the employees'?

I do not think Congress intended, by this legislation, to create rights in unions overriding those of the employees they represent.[18] Nor did it require a special form or mode for ending a collective agency any more than for creating it. What Congress did was to give the designated union the exclusive right to bargain collectively as long as, and only as long as, a majority of the employees of the unit consent to its doing so. When that majority vanishes by the employees' voluntary action, whatever form this may take, and the fact is made unmistakably clear to the employer, it not only is no longer under duty to deal with the union; it comes under affirmative obligation not to do so. For otherwise it would be dealing with a representative not of the employees' choice.

There are two possibly applicable limitations. One is that the employer must not interfere to bring about the abandonment. The other is that, in large units, where there are difficult problems of ascertaining whether a majority exists at a particular time, a reasonable degree of stability in employment relations may require, to give the statute workable operation, that a majority designation be deemed to continue for a reasonable period, though changes meanwhile may take away the clearly existing majority, a question not yet finally determined.[19]

The latter limitation, if it is one, can have no reasonable application to a small unit and a small employer under circumstances like those involved here. In such a situation to impose it, where the actual desires of the majority may be easily and readily ascertained at any time, would be to force men into unions and into dealing with their employers through unions contrary to the employees' own wishes. The statute has no such purpose.

But it is said the other limitation applies here, that the employer shall offer no inducement and exert no influence to secure abandonment. This, too, is a salutary principle when properly applied. And it may be applied as well to a small unit and a small employer as to large ones. But again the limitation is not universally applicable. Whether it is applicable or not depends

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[18] Cf. note 15 *supra*.

[19] Cf. National Labor Relations Board v. Century Oxford Mfg. Corp., — F. 2d — (C. C. A.), decided February 15, 1944.

upon what the employer does. Clearly if he stimulates a proposal from the employees to abandon the union for any substantial advantage he may give, the limitation should be effective. But does he do this when, with no suggestion or intimation on his part, when rather he has shown every willingness to leave the whole matter of their organization to his employees and to deal with them in any way they wish, they come to him, without influence, without coercion, and make a proposal wholly of their own conception and desire?

It is not impossible for men to want wage increases and also to remain or become nonunion men at the same time. Nor is such a combination of desires illegal. When such a proposal is thus made, and the employer does no more than was done here, namely, accede to it, knowing he is dealing with a majority of the unit, saying in effect, "Whether or not you have a union is your own business, not mine. But whether you do or not, you get the increase you want," then in my judgment two things have happened: (1) The employees have revoked the collective agency, as they have a right to do; and (2) the employer has been guilty of no unfair labor practice either in hearing their proposal or in acceding to it. He has done no more than comply with the wishes of the majority, freely formed and freely stated. And this it is the employer's duty to do under the statute. If thereby the union has been by-passed, it is not through the employer's action, but rather through that of the employees. The employer's response, so limited, is not a violation of the principle, recently stated here,[20] that individual employees cannot deal with the employer to create terms in the contract of employment inconsistent with the collective agreement. Such a situation presents no case of inconsistent individual bargaining. It involves rather one of collective bargaining, not by individuals as such, but by the majority on behalf of the unit.

Finally, if more is needed, the matter should be considered in the light of Medo's predicament when the employees made the proposal, account being taken of the alternative courses open to it. Under the Court's ruling it was between the devil and the deep blue sea. There was no answer Medo could give which would not

[20] J. I. Case Co. *v.* National Labor Relations Board, No. 67, this Term; Order of Railroad Telegraphers *v.* Railway Express Agency, Inc., No. 343, this Term, both decided February 28, 1944.

leave it open to a charge and a finding of unfair labor practice. The employees wanted an increase, according to the findings, with the union if they could not get one without it; without the union, if they could. The main thing in their minds was the increase, not the union.[21] In effect, according to the findings, they said so to their employer. It had to keep silent or reply. It could reply in several ways: (1) The union is your exclusive agent and we cannot deal with you while it is such; (2) we will give you the increase if you discharge the union; do that and then come back; (3) we will give you the increase and you can do as you please about the union; (4) we will not give the raise, union or no union.

The Court says the company's reply should have been (1), whereas its response actually was (3).[22] It finds the latter bad because in effect it offered "inducement" to the employees to abandon the union. The trouble is that the same thing would have been true of (1) or of any of the other possible replies. Answers (2) and (4) clearly would constitute unfair labor practices, under the Court's view, the former as offering inducement to abandon, the latter as a flat refusal to bargain through the union or otherwise. Answer (1), while purporting to say only that the employer could not deal with anyone as long as the union retained its exclusive agency, in fact would be infected with two faults. One would be the assumption that the employees could not revoke the agency and take matters back into their own hands, without giving prior notice to the union, a question involved in the issues here. But, even more plainly, by making this response the employer would open itself to the charge and to the finding that it had said, in effect: "We cannot deal with you directly while the union's agency stands unrevoked," and thereby had offered, by clear implication, the inducement of dealing with the employees directly, conditioned upon their discharging the union.

The only other answers open to the employer were (3), the one Medo actually made, and to remain silent. Merely ignoring the employees might have been taken to mean anything, but more

[21] Cf. note 13 *supra*.

[22] That this is the fair meaning of Medo's response is clear from its refusal to discuss or interfere in the employee's union activities, cf. note 12 *supra*.

probably answer (4) than any other. Silence therefore afforded no escape from the trap. Nor does the Act require silence in such a situation. Consequently answer (3), which Medo gave, was the only one it could give consistently with the view that the employer should hold out no inducement to the employees to abandon the union. In effect it said simply, "We are perfectly willing you should have the increase. But whether you have it through the union or without it is entirely your own business and we will not have anything to do with this." Any other reply would have been a counter-proposal offering inducement to abandon or a rejection of all bargaining. The answer Medo gave was neither. It was merely accession to the employees' wishes, not "inducement" or offer held out; and it was coupled with the clear indication, under the circumstances, that what the employees might do about the union was wholly their own affair and none of Medo's.

Accordingly, I think Medo gave the only possible answer consistent with the statute's requirements and purposes and the only one which afforded no substantial basis for finding either that it was refusing to bargain collectively or that it was interfering with the employees' rights of organization by offering inducement to get rid of the union. In my opinion the Wagner Act was not designed or intended to put an employer, whose sole purpose and conduct are to give his employees completely free rein in matters of organization and collective bargaining, on such a spot that anything he may do will be, or will form the basis for a finding that it is, an unfair labor practice. So to construe the Act not only would make it a trap for employers, but also would defeat the very purposes the statute was intended to accomplish, by fastening upon employers and employees alike union domination the latter do not want. This would be to destroy, not to safeguard, the employees' basic right of collective bargaining by representatives of their own choosing. I would reverse the judgment with instructions to dismiss the petition for enforcement.